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ARTICLE

REFLECTIONS ON THE LIGHT: JUDGE NOONAN'S CONTRIBUTIONS TO THE DEBATE ON RELIGION IN THE PUBLIC SQUARE

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The proper role of religious beliefs in American political life is a familiar subject in today's academy. Philosophers,¹ political philosophers,² and theologians³ have joined legal scholars⁴ in a vigorous and long-running

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1. See e.g. Robert Audi, *Religious Commitment and Secular Reason* (Cambridge U. Press 2000); Robert Audi & Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Rowman & Littlefield Publishers 1997); Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge U. Press 2002).

2. See e.g. Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (The Belknap Press of Harvard U. Press 1996); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Harvard U. Press 2000); John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997) [hereinafter Rawls, *Public Reason Revisited*]; John Rawls, *Political Liberalism* (Columbia U. Press 1993) [hereinafter Rawls, *Political Liberalism*].

3. For works by theologians and religious ethicists, see e.g. Franklin I. Gamwell, *The Meaning of Religious Freedom: Modern Politics and the Democratic Resolution* (St. U. of N.Y. Press 1995); David Hollenbach, SJ, *The Common Good and Christian Ethics* (Cambridge U. Press 2002); David Hollenbach, SJ, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 San Diego L. Rev. 877 (1993); Kathryn Tanner, *Public Theology and the Character of Public Debate*, 17 Annual Socy. Christian Ethics 79 (1997).

4. See e.g. Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford U. Press 1995) [hereinafter Greenawalt, *Private Consciences*]; Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford U. Press 1988) [hereinafter Greenawalt, *Religious Convictions*]; Michael J. Perry, *Under God? Religious Faith and Liberal Democracy* (Cambridge U. Press 2003) [hereinafter Perry, *Under God*]; Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (Oxford U. Press 1997) [hereinafter Perry, *Religion in Politics*]; Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (Oxford U. Press 1991) [hereinafter Perry, *Love and Power*].

debate over the place of religion in America's "public square." There is, of course, no single question on which all of these scholars have focused. Rather, the debate includes a series of interrelated questions. Is it permissible to invoke religious convictions in political argument and advocacy? May one rely on religious convictions in making political decisions? Do the answers to either of these questions depend upon whether fundamental constitutional questions are at stake, or coercive laws that restrain conduct, or are the answers the same for all political issues? Should the same rules apply to both ordinary citizens and government officials, and among government officials, should judges be treated differently than legislators or executives? Should religious organizations and leaders be subject to the same standards as religious individuals? If restrictions on religion apply, are these restraints legal in form or only a matter of political morality?

How many of these questions participants address and the answers that they give vary widely, and even where there is substantial overlap among the contributors, many nuances distinguish their positions. Despite this enormous variation, however, a common theme emerges. Most voices in the debate agree that significant restrictions on religious participation in politics are appropriate even if only as a matter of political morality rather than legal rule. The restrictions that scholars advocate range from almost total exclusion and privatization of religion⁵ to much more limited restraints,⁶ but they agree that religious claims should receive special scrutiny and special disabilities.

In this essay, I will be examining the light that Judge John T. Noonan, Jr.'s scholarship sheds on this debate.⁷ Judge Noonan is in the minority. He believes that religious convictions may play a role in both political debate as well as decision-making without special limitation or restraint. He also would not restrict the activities of government officials or religious groups and leaders. Even among those who share this minority position, however, Judge Noonan's position is unusual, indeed, unique. For Judge Noonan, the active participation of religious individuals and groups in American politics is not only permissible, but it is the very "end" of our free exercise guaran-

5. See e.g. Richard Rorty, *Religion as Conversation-stopper*, in *Philosophy and Social Hope* 168, 169 (Penguin Books 1999) (advocating the privatization of religion and its exclusion from the public square); William P. Marshall, *The Other Side of Religion*, 44 *Hastings L.J.* 843, 863 (1993) (advocating "the erection of a presumptive barrier against religious participation in the public square").

6. See e.g. Greenawalt, *Private Consciences*, *supra* n. 4 (ordinary citizens may rely on religious convictions in political decision-making and make religious arguments; restrictions apply to quasi-public citizens and government officials).

7. The Honorable Judge John T. Noonan, Jr. is Senior Judge, United States Court of Appeals for the Ninth Circuit. Judge Noonan's distinguished career as a legal scholar has included appointments to the law faculties at the University of California at Berkeley and Notre Dame, as well as visiting positions at Harvard, Stanford, UCLA, and Boston College, among other universities.

tee.⁸ The principle of free exercise is not exhausted in the protection of religious belief and practice from infringement by the state, though that is certainly an important function of the First Amendment. Rather, the First Amendment is, in Judge Noonan's words, also a "charter for . . . religious interventions in society."⁹ Thus, religion is special. It has an especially important role to play in the development of our political norms and values. In what follows, I will examine and reflect upon the reasons that Judge Noonan gives for his position. These reasons go well beyond the claims that one typically encounters in this debate, and they provide a unique perspective on what America would lose if religion were excluded or limited in politics.

I. BACKGROUND ON THE DEBATE

In order to appreciate the significance of Judge Noonan's contributions, it is necessary to begin with some background on the debate. While those who advocate restrictions on religious participation in politics offer a variety of different proposals, there is a common form to many of their arguments. Religious claims, these scholars argue, must be excluded or restricted because they fail to satisfy a necessary criterion for political participation. The relevant criteria differ from scholar to scholar, but common examples include public reason, public accessibility, and secular reason. For example, John Rawls has argued that advocacy and decision-making on constitutional essentials and questions of basic justice must rest upon reasons that all citizens can be reasonably expected to endorse.¹⁰ Rawls refers to this as the ideal of public reason.¹¹ A number of scholars have followed Rawls. For example, Stephen Macedo, Amy Gutmann, and Dennis Thompson have embraced a similar view and have favored extending the concept of public reason beyond fundamental constitutional questions.¹² For these scholars, political questions more broadly should be debated and decided according to reasons that are or can be shared among fellow citizens and, thus, found mutually acceptable.¹³ Religious convictions and other comprehensive philosophical or moral doctrines about truth as a whole fail the test of public reason because we can never expect all citizens to agree upon

8. John T. Noonan, Jr., *The End of Free Exercise?* 42 DePaul L. Rev. 567, 579, 580 (1992).

9. John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 4 (U. of Cal. Press 1998).

10. See Rawls, *Political Liberalism*, *supra* n. 2, at 217, 224-25, 243; Rawls, *Public Reason Revisited*, *supra* n. 2, at 773. In his latest work, Rawls would permit citizens to use nonpublic reasons in political debate provided that "in due course" they give public reasons for their positions. *Id.* at 776.

11. For extensive discussions of public reason, see *Lecture VI*, in Rawls, *Political Liberalism*, *supra* n. 2, at 212-54 and Rawls, *Public Reason Revisited*, *supra* n. 2.

12. See Gutmann & Thompson, *supra* n. 2, at 85 n. 44; Macedo, *supra* n. 2, at 169, 172-73.

13. See Gutmann & Thompson, *supra* n. 2, at 14, 52-53, 55; Macedo, *supra* n. 2, at 136, 143, 169-72, 186-87. Gutmann and Thompson speak of the principle of reciprocity. Gutmann & Thompson, *supra* n. 2, at 13-14. Rawls also uses this term. See Rawls, *Public Reason Revisited*, *supra* n. 2, at 766-67, 770.

such doctrines.¹⁴ Religious claims are especially problematic when they require others to take a leap of faith or adopt a particular religious way of life to be fully understood and appreciated.¹⁵

A related criterion is public accessibility. If claims cannot be understood and evaluated according to shared forms of reasoning, they are not publicly accessible and restrictions apply.¹⁶ Religious claims are, in the view of the scholars who embrace this criterion, either wholly or partly inaccessible. For example, Abner Greene suggests that religious convictions are inherently inaccessible because they refer beyond human experience "to an extrahuman source of value"¹⁷ that is unavailable to citizens who do not take a similar leap of faith.¹⁸ In Greene's words, "[i]f I fail to see the light of Jesus Christ's divinity, I am stopped cold" absent a conversion.¹⁹ Kent Greenawalt has a more nuanced understanding of religious belief. Religious convictions are not unrelated to human experience or resistant to logical analysis,²⁰ and some religious claims may be accessible.²¹ However, where religious belief involves personal experience or intuition or a leap of faith, as it frequently does, it is often not fully accessible to outsiders.²² Both Greenawalt and Greene would place restrictions on the role of religion in politics.²³

14. See Rawls, *Political Liberalism*, *supra* n. 2, at 58, 63, 243; Rawls, *Public Reason Revisited*, *supra* n. 2, at 766-67; see also Gutmann & Thompson, *supra* n. 2, at 92-93; Macedo, *supra* n. 2, at 167-68.

15. See Gutmann & Thompson, *supra* n. 2, at 57; Macedo, *supra* n. 2, at 172.

16. Kent Greenawalt discusses this position in chapter four of *Greenawalt, Religious Convictions*, *supra* n. 4, at 49-84; and chapter seven of *Greenawalt, Private Consciences*, *supra* n. 4, at 72-84.

17. Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611, 1614, 1617 (1993).

18. *Id.* at 1614, 1617, 1619-20; Abner S. Greene, *Uncommon Ground*, 62 Geo. Wash. L. Rev. 646, 659 (1994) (reviewing John Rawls, *Political Liberalism* (Columbia U. Press 1993) and Ronald Dworkin, *Life's Dominion* (Alfred A. Knopf, Inc. 1993)).

19. Greene, *supra* n. 18, at 659-60.

20. See Greenawalt, *Religious Convictions*, *supra* n. 4, at 70-71. Macedo, Gutmann and Thompson describe religious beliefs as "impervious" to logical analysis. Gutmann & Thompson, *supra* n. 2, at 56; Macedo, *supra* n. 2, at 172.

21. See Greenawalt, *Private Consciences*, *supra* n. 4, at 44.

22. See *id.* at 39-40, 96; Greenawalt, *Religious Convictions*, *supra* n. 4, at 71-75.

23. Greenawalt favors restraints on the use of religious arguments in discourse by quasi-public citizens and government officials. See Greenawalt, *Private Consciences*, *supra* n. 4, at 7. In his earlier work, Greenawalt also favored restrictions on ordinary citizen discourse, see Greenawalt, *Religious Convictions*, *supra* n. 4, at 216-17, and he argued that citizens should not rely on religious beliefs in making decisions where publicly accessible reasons give clear answers to political questions, see *id.* at 207. Greene objects to laws that are enacted for the express purpose of advancing values grounded in religion. See Greene, *supra* n. 17, at 1614. In his view, when laws are based on such purposes, nonbelievers are excluded from meaningful participation in political discourse. *Id.* at 1614. According to Greene, the establishment clause requires that laws have a dominant express purpose that is secular and does not appear to be pretextual. *Id.* at 1623-24.

In *Love and Power*, Michael Perry also defends a requirement of public accessibility, but his understanding of this requirement is somewhat different from the criteria used by other scholars. For Perry, the standard of public accessibility excludes religious arguments only when they are

Another familiar criteria is secular reason. For example, Robert Audi has argued that citizens should not support or advocate laws that restrict human conduct unless they have and are willing to offer an "adequate secular reason" that motivates them even apart from their religious beliefs.²⁴ In *Religion in Politics*, Michael Perry makes a similar proposal that would apply to decisions to restrict human conduct on the ground that the conduct is immoral. Where such choices are involved, citizens should not rely on religious arguments about the requirements of human well-being unless they believe that a persuasive secular argument reaches the same conclusion.²⁵

The reasons that scholars give for limiting the role of religion in politics overlap substantially. For example, scholars argue that mutual respect and fairness require restraint. Citizens in a liberal democracy characterized by religious and moral pluralism show each other respect when they discuss and decide political questions on the basis of premises or modes of reasoning that are shared or at least intelligible and accessible to all.²⁶ Fairness also requires the use of standards that can appeal to believers and nonbelievers alike. Citizens are not treated fairly when only some can meaningfully participate in political debate and decision-making that binds them

"sectarian" or "authoritarian." Perry, *Love and Power*, *supra* n. 4, at 106. A sectarian argument relies on "experiences or premises that have little if any authority" for nonbelievers, *id.*, such as scripture, revelation, special inspiration or communication with God, *id.* at 117, 120. An argument is authoritarian if it relies on "persons or institutions that have little if any authority" for nonbelievers. *Id.* at 106. As long as religious convictions are reformulated as human insight into the requirements of human well-being, they are publicly accessible. *Id.* at 109-11. Religious beliefs need not be inferable from shared forms of reasoning to be admissible. Indeed, Perry's coherentist conception of rationality challenges the notion that there are common norms and methods of reasoning that will be shared for all peoples at all times. For Perry's coherentist theory of rationality, see *id.* at 52-65.

24. Audi, *supra* n. 1, at 86, 96.

25. See Perry, *Religion in Politics*, *supra* n. 4, at 6. While Perry would limit reliance on religious reasons in political decision-making, he rejects restrictions on the use of religious arguments in debate. See *id.* at 44-45. In his earlier work, Perry favored significant restrictions on religious arguments in political discourse, and he did not favor restrictions on decision-making. See Perry, *Love and Power*, *supra* n. 4. In his most recent work, *Under God? Religious Faith and Liberal Democracy*, Perry now argues that neither the establishment clause nor liberal political morality forbids reliance on religious convictions in political discussion and decision-making even when these beliefs are not supported by a persuasive secular rationale. See Perry, *Under God*, *supra* n. 4, at 34-35. However, Perry does favor a principle of self-restraint for Christians in certain cases where biblically grounded moral beliefs are not supported by a persuasive argument based on contemporary human experience. See discussion, *infra* n. 190.

Kathleen Sullivan has also argued that political choices must be resolved "only on grounds articulable in secular terms." Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 197 (1992). However, she rejects an additional requirement of secular motivation. *Id.* at 197 n. 9.

26. See e.g. Audi, *supra* n. 1, at 115 (respect for others requires that we have, and be motivated by, adequate secular reasons for our political positions); Gutmann & Thompson, *supra* n. 2, at 79 (mutual respect lies at the core of the principle of reciprocity); Macedo, *supra* n. 2, at 187 (mutual respect requires that we "owe our fellow citizens reasons that they can share with us").

all.²⁷ In addition, the liberal commitment to human autonomy is undermined when rational and informed citizens are subject to coercive laws for reasons that they do not find persuasive.²⁸

Scholars also argue that religious participation in politics threatens to produce divisiveness and strife. When political debate and decision-making draw upon religious norms that are not widely shared or accessible, nonbelievers will feel resentment and alienation.²⁹ Resentment and frustration are also natural reactions when individuals are coerced by laws that they do not find persuasive.³⁰ The consequence is social and political instability.³¹ Moreover, the zeal with which religious believers advance their positions and the tenacity of their commitments are especially dangerous in a religiously diverse environment.³² Disagreements between believer and nonbeliever and among believers become a "clash of Gods vying for social control."³³ For William Marshall, religion has a "dark side" that is "inherently intolerant and persecutory."³⁴ A fanatical devotion to the religious cause, a tendency to see opponents as "aligned with the 'powers of chaos,'" and "[f]ervent beliefs fueled by . . . fear" threaten to transform the public square into a "battleground" characterized by "intolerance, repression, hate, and persecution."³⁵

The arguments made by scholars who oppose restraints on religion in politics are also familiar. Respect and fairness, they argue, do not require the exclusion of religion from politics but, rather, the opposite. Religious believers are not accorded full respect as citizens when their views are excluded from or restricted in political deliberations to which others are invited.³⁶ As long as believers consider their decisions with care,³⁷ offer what

27. See e.g. Greene, *supra* n. 17, at 1619-20 (basing laws expressly on religious convictions "effectively excludes those who don't share the relevant religious faith from meaningful participation in the political process"); Greenawalt, *Private Consciences*, *supra* n. 4, at 72 (summarizing the argument that "it is fundamentally unfair to coerce people, or to use the corporate authority and power of the state, when the grounds for doing so are not ones that all those affected could be expected to accept if they made reasonable judgments"); Gutmann & Thompson, *supra* n. 2, at 2 (citizens who seek fair terms of social cooperation will "try to find mutually acceptable ways of resolving moral disagreements"); Rawls, *Political Liberalism*, *supra* n. 2, at 16, 49-50, 54, 214, 217 (the idea of society as a fair system of social cooperation among citizens regarded as free and equal requires use of public reason); Rawls, *Public Reason Revisited*, *supra* n. 2, at 770 (same).

28. See Audi, *supra* n. 1, at 67, 123.

29. See *id.* at 158-59; Greenawalt, *Religious Convictions*, *supra* n. 4, at 217-19.

30. See Audi, *supra* n. 1, at 67, 123.

31. See Greenawalt, *Private Consciences*, *supra* n. 4, at 24, 72. For an extended discussion and critique of this argument, see Eberle, *supra* n. 1, at 152-86.

32. See Audi, *supra* n. 1, at 69, 100-03.

33. *Id.* at 103.

34. Marshall, *supra* n. 5, at 854.

35. *Id.* at 859.

36. See Eberle, *supra* n. 1, at 150-51.

37. See *id.* at 88 (citizens should "pursue a high degree of rational justification for any coercive law she supports and ought to withhold her support from any coercive law for which she lacks a high degree of rational justification").

they regard as their best reasons for their positions,³⁸ try to formulate justifications that others will find convincing,³⁹ remain willing to listen and learn from opponents,⁴⁰ and eschew reasons that deny the personhood or full humanity of fellow citizens,⁴¹ they give their fellow citizens due respect.⁴² Fairness also requires that religious and nonreligious views alike be heard and considered.⁴³

Opponents of restraint do not fear political instability. Divisiveness and strife are not a significant threat in America today,⁴⁴ and controversial secular beliefs are just as likely to be a source of social and political disharmony as religious beliefs.⁴⁵ Indeed, in the past century, secular ideologies such as communism and fascism were the chief source of repression and persecution in the West.⁴⁶ Religious arguments can, moreover, be loving as well as intolerant,⁴⁷ and they have, at times, been "powerfully moving and unifying."⁴⁸ Alienation and frustration would increase, not decrease, if religious believers are subject to special disabilities in public life.⁴⁹

Restraint is also inconsistent with the liberal commitment to autonomy. For many religious believers, their faith has political aspects. Their convictions provide norms and values that bear on political life, and these convictions invite or demand political engagement.⁵⁰ Where this is so, re-

38. See William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* 109 (Cambridge U. Press 1991); Perry, *Under God*, *supra* n. 4, at 47-48; Perry, *Religion in Politics*, *supra* n. 4, at 58-59, 64-65.

39. See Eberle, *supra* n. 1, at 99; Perry, *Under God*, *supra* n. 4, at 48; Nicholas Wolterstorff, *Audi on Religion, Politics, and Liberal Democracy*, in Audi & Wolterstorff, *supra* n. 1, at 145, 160.

40. See Eberle, *supra* n. 1, at 102-03; Nicholas Wolterstorff, *The Role of Religion in Decision and Discussion of Political Issues*, in Audi & Wolterstorff, *supra* n. 1, at 67, 111, 112-13; Wolterstorff, *supra* n. 39, at 159-60.

41. See Eberle, *supra* n. 1, at 104; Perry, *Religion in Politics*, *supra* n. 4, at 65.

42. Christopher Eberle refers to these responsibilities as the "ideal of conscientious engagement." Eberle, *supra* n. 1, at 104. For further discussion of this ideal, see *id.* at 104-05. Eberle's ideal shares much in common with the views of Nicholas Wolterstorff. According to Wolterstorff, respect for others does not require restricting the use of religious reasons in politics, but it does require believers to "listen with the goal in mind of learning from [others]. To listen also with the goal in mind of discerning how [they] can communicate . . . [their] perspective[s] and perhaps persuade [others] of [the] cogency" of their positions. Wolterstorff, *supra* n. 39, at 160.

43. See Greenawalt, *Private Consciences*, *supra* n. 4, at 99; Perry, *Under God*, *supra* n. 4, at 28, 30, 32-33; Wolterstorff, *supra* n. 40, at 105, 116; Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments should be Excluded from Democratic Deliberation*, 1999 Utah L. Rev. 639, 655-56, 657.

44. See Perry, *Under God*, *supra* n. 4, at 130; Wolterstorff, *supra* n. 40, at 79.

45. See Perry, *Under God*, *supra* n. 4, at 40-41, 49; Perry, *Religion in Politics*, *supra* n. 4, at 45.

46. See Wolterstorff, *supra* n. 40, at 80.

47. See Douglas Laycock, *Freedom of Speech that is Both Religious and Political*, 29 U.C. Davis L. Rev. 793, 801 (1996); see also Perry, *Under God*, *supra* n. 4, at 41.

48. Laycock, *supra* n. 47, at 808; see also Perry, *Under God*, *supra* n. 4, at 41.

49. See Eberle, *supra* n. 1, at 174, 183-84; McConnell, *supra* n. 43, at 650.

50. See Eberle, *supra* n. 1, at 145; Greenawalt, *Private Consciences*, *supra* n. 4, at 67; Perry, *Love and Power*, *supra* n. 4, at 81; Wolterstorff, *supra* n. 40, at 105.

straints on religious participation in political life would place a heavy burden on believers⁵¹ and would severely restrict their freedom to live out their faith.⁵² The consequence would also be a substantial infringement of free exercise values.⁵³

The desire to base political decisions on shared or accessible reasons is, these scholars further argue, impossible. Shared premises and forms of reasoning do not resolve many of the important political questions that confront Americans.⁵⁴ To exclude or restrict religious convictions when other nonshared beliefs may play a role would be especially unfair.⁵⁵ Moreover, it is difficult, if not impossible, for believers to separate their religious convictions from their other beliefs so that their faith does not impermissibly affect their political activities.⁵⁶ Indeed, to ask religious citizens to do so is to ask them to “bracket—to annihilate—essential aspects of [their] very sel[ves]”⁵⁷ and, thereby, undermine their “wholeness and integrity” as persons.⁵⁸

History also favors those who oppose restraint. Religious values have played a critical role in the development of America’s political values, including in the formation of the republic and the adoption of the First Amendment.⁵⁹ Religious convictions have “enrich[ed] our common life”⁶⁰ and have been a prophetic voice for social change and reform.⁶¹ If religious perspectives were excluded from our political life, we would lose an important moral resource that has pushed America in the direction of social and political progress and renewal.⁶²

Scholars have also attacked the criteria used to exclude or restrain religion in political life. For example, Christopher Eberle and Nicholas Wolterstorff have both argued that none of the criteria that have been proposed accomplish what their supporters expect. According to Eberle, none of these criteria are sufficiently powerful to restrict religious convictions

51. See Eberle, *supra* n. 1, at 147; McConnell, *supra* n. 43, at 655.

52. See Wolterstorff, *supra* n. 40, at 77, 94.

53. See Greenawalt, *Private Consciences*, *supra* n. 4, at 67; Wolterstorff, *supra* n. 40, at 105.

54. See Greenawalt, *Religious Convictions*, *supra* n. 4, at 56, 69, 87, 222; Perry, *Love and Power*, *supra* n. 4, at 9, 96-97; McConnell, *supra* n. 43, at 656.

55. See Greenawalt, *Religious Convictions*, *supra* n. 4, at 49, 87, 144-45.

56. See *id.* at 44, 152; Greenawalt, *Private Consciences*, *supra* n. 4, at 138.

57. Perry, *Love and Power*, *supra* n. 4, at 4 (quoting Michael Perry, *Morality, Politics, and Law* 181-82 (Oxford U. Press 1988)).

58. Greenawalt, *Religious Convictions*, *supra* n. 4, at 237.

59. See Perry, *Under God*, *supra* n. 4, at 124-26; Wolterstorff, *supra* n. 40, at 80; Laycock, *supra* n. 47, at 801-03; McConnell, *supra* n. 43, at 645-47.

60. Wolterstorff, *supra* n. 40, at 111; see also Greenawalt, *Private Consciences*, *supra* n. 4, at 100, 178; Perry, *Religion in Politics*, *supra* n. 4, at 48-49; Laycock, *supra* n. 47, at 801.

61. See Perry, *Love and Power*, *supra* n. 4, at 81, 127; Wolterstorff, *supra* n. 40, at 80; Laycock, *supra* n. 47, at 801-03; McConnell, *supra* n. 43, at 647, 649.

62. See Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 Vill. L. Rev. 77, 156-58 (2004).

without also restricting other types of moral judgments that are essential to a healthy political community.⁶³ For Wolterstorff, there are no shared premises, no common human reason, no uniform standard of secular reason that all can draw upon apart from their particular backgrounds, beliefs, and local communities.⁶⁴ Rationality is perspectival,⁶⁵ and no consensus should be expected even from adequately informed, fully rational citizens.⁶⁶ According to Wolterstorff, "we cannot leap out of our perspectives. And even if we could, there is nothing firm that we could leap on to: no adequate independent source."⁶⁷ In Wolterstorff's view, "we are talking about the politics of earthly cities, not about the politics of the heavenly city."⁶⁸

II. JUDGE NOONAN'S LIGHT

Judge Noonan's defense of religious participation in politics includes many of these familiar arguments against restraint. He has argued that shared beliefs and ways of reasoning will not resolve our pressing political questions and, thus, that the exercise of political power will necessarily involve the imposition of values.⁶⁹ To exclude or restrain religious citizens in politics while allowing nonbelievers to rely upon their beliefs is unfair.⁷⁰ Moreover, limiting religious participation in politics hampers one of the most important sources for social critique and reform. For example, over its history, the Catholic Church has advocated positions "more just, more charitable, more humane than those dominant in the society it has addressed," and the "voice of the Church has been raised for mercy."⁷¹ In American history, religious crusades were indispensable to the abolition of slavery and the civil rights movement.⁷² These crusades did not proceed without generating conflict and division, and the zeal of the crusaders was met with resentment and anger among slaveholders and southern whites,⁷³ but pro-

63. See Eberle, *supra* n. 1, at 239, 294. According to Eberle, no criteria "that is sufficiently powerful to mandate restraint with respect to [religious claims] is, when applied consistently, also sufficiently powerful to mandate restraint with respect to all but the most platitudinous moral convictions." *Id.* at 294.

64. See Wolterstorff, *supra* n. 40, at 89, 98-99, 108-09.

65. See *id.* at 99, 113.

66. See *id.* at 99; Wolterstorff, *supra* n. 39, at 152-54, 161. Robert Audi envisions a political community where all coercive laws are acceptable to fully rational, adequately informed citizens. See Audi, *supra* n. 1, at 65-67. According to Wolterstorff, there is no generic fully rational, fully informed human being; our reason is always shaped by our background and existing beliefs. See Wolterstorff, *supra* n. 40, at 89, 98-99; Wolterstorff, *supra* n. 39, at 161.

67. Wolterstorff, *supra* n. 40, at 113.

68. Wolterstorff, *supra* n. 39, at 160.

69. See John T. Noonan, Jr., *The Bishops and the Ruling Class: The Moral Formation of Public Policy*, in *Religion, Science, and Public Policy* 138, 141 (Frank T. Birtel ed., Crossroad Publ. Co. 1987).

70. See *id.* at 141.

71. *Id.* at 142.

72. See Noonan, *supra* n. 9, at 250-52, 256-58.

73. See *id.* at 251-52, 257.

gress was made.⁷⁴ Not all crusades will produce good fruit,⁷⁵ but “few w[ill] find all bad.”⁷⁶ Indeed, as Judge Noonan has argued, the idea of free exercise itself is a concept with theological roots.⁷⁷

While Judge Noonan has made familiar arguments against restraint, his defense goes well beyond them. For Judge Noonan, religious involvement in social and political life is also a necessary and positive manifestation of America’s commitment to free exercise. It is, indeed, the end of free exercise. In order to fully appreciate this position, one must examine Judge Noonan’s understanding of free exercise. Judge Noonan himself turns to James Madison as his leading guide.⁷⁸ James Madison was, according to Judge Noonan, the man primarily responsible for the free exercise guarantee in the First Amendment,⁷⁹ and his insight shaped this achievement.⁸⁰ Of course, the idea of free exercise did not originate with Madison. Its earliest roots were in the Bible,⁸¹ and it also draws on the concept of conscience that converged with the early Christian tradition in the Greco-Roman world.⁸² The experience of religious persecution and war also fostered its development,⁸³ as did the writings of John Locke and Roger Williams and other early critics of persecution.⁸⁴ However, Madison gave the idea “more perfect expression” as he drew upon all these experiences and sources.⁸⁵ More than any other figure in the founding era, Madison “ca[ught] the quintessence of the drive” to full religious liberty.⁸⁶

Madison’s fundamental insight was that religion consists of a relationship between God and human persons which must remain free from any state interference or control.⁸⁷ Where the demands of conscience and the state conflict, the former must be recognized as superior.⁸⁸ Religion is a matter “wholly exempt” from state control.⁸⁹ Behind these conclusions lie theological premises. Madison believed in a God who is both “the Creator and the Lawgiver and the Governor of the world.”⁹⁰ God desires to be in

74. *See id.* at 8, 260, 357-58.

75. *See id.* at 8, 250.

76. *Id.* at 8.

77. *See id.* at 89, 357-58.

78. *See id.* at 90.

79. *See id.* at 3.

80. *See id.* at 68-69, 90.

81. *See id.* at 43.

82. *See id.* at 44.

83. *See id.* at 49-50.

84. *See id.* at 50, 55-56, 58.

85. *Id.* at 58.

86. *Id.* at 4.

87. *See id.* at 88-89.

88. *See id.* at 82.

89. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in *The Papers of James Madison* vol. 8, 295, 299 (Robert A. Rutland & William M.E. Rachal eds., U. of Chi. Press 1973).

90. Noonan, *supra* n. 9, at 75.

relationship with human beings, and in the faculty of conscience, God speaks to us.⁹¹ Where the voice of God is heard, the individual must follow.⁹² Obedience to conscience is a "duty" owed to the Creator,⁹³ and, thus, the rights of conscience are both "*natural and absolute*."⁹⁴ For the "Father of Free Exercise," free exercise was a theological concept that rested upon "a faith conventional in its day but for all that palpably alive, a faith stupendous in modern eyes, the faith that God in us speaks to us."⁹⁵

According to Judge Noonan, religious involvement in politics is the quintessential manifestation of America's commitment to free exercise. Among America's religious communities, the voice of conscience has never been confined to private or otherworldly matters.⁹⁶ To the contrary, God has demanded engagement with the world and, not infrequently, reformation of society and its laws.⁹⁷ Thus, religious believers have sought to influence the morals of the country,⁹⁸ and in religious crusades, they have even waged battle against the existing order.⁹⁹ These crusades have demonstrated that free exercise can be subversive of the state and political stability.¹⁰⁰ Certainly Madison's commitment to the freedom of conscience is "radical,"¹⁰¹ and in American history it has exacted a price.¹⁰² During religious crusades, social tension has been high,¹⁰³ and not all visions for social change have been positive.¹⁰⁴ However, Madison's theological premises "compel" his commitment¹⁰⁵ and endorse this involvement. Because God speaks to persons, the openness of humanity to the transcendent must be protected. Our very human nature demands it. Our Creator requires it. Where, as in America, God speaks to persons about the structure of society and norms for social and political life, the end of free exercise becomes religious intervention in public life.¹⁰⁶

91. *See id.* at 68, 75, 89.

92. *See id.* at 75.

93. Madison, *supra* n. 89, at 299.

94. James Madison, *Autobiography* (c. 1833), in Douglas Adair, *James Madison's Autobiography*, 2 Wm. & Mary Q. 3d Series 191, 199 (1945) (Madison's emphasis).

95. Noonan, *supra* n. 9, at 89.

96. *See id.* at 110-11; Noonan, *supra* n. 8, at 579-80.

97. *See* Noonan, *supra* n. 9, at 111, 259-60.

98. *See id.* at 8, 18, 259.

99. *See id.* at 250, 258-60.

100. *See id.* at 258-60, 357-58.

101. *Id.* at 75, 89.

102. *Id.* at 258-59.

103. *See id.*

104. *See id.* at 8, 250.

105. *Id.* at 75.

106. According to Judge Noonan, in America's religious crusades, "you . . . see the end of religious freedom, the free exercise of belief to influence society and produce political results." Noonan, *supra* n. 8, at 580.

A. *What James Madison Did Not See*

At first glance, it seems puzzling for Judge Noonan to turn to Madison for support in the current debate over religion in politics. Madison had no familiarity with the circumstances that make religious intervention in politics so problematic today. When Madison defended religious liberty in the late eighteenth century, the differences among religious sects concerned doctrine and worship. Supporters of free exercise worked to protect the right of citizens to form and profess religious opinions freely and worship God without interference from the state.¹⁰⁷ On matters of morality, especially moral principles related to the welfare of civil society, there was almost unanimous agreement. In the words of Thomas Jefferson, "the moral branch of religion . . . is the same in all religions; while in that branch which consists of dogmas, all differ, all have a different set."¹⁰⁸ The Baptist

107. The Virginia Act for Establishing Religious Freedom, drafted by Thomas Jefferson and enacted by the General Assembly in 1786, is a good example. The Act states that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever" and prohibits any discriminatory treatment based on religious "opinions or belief." Va. Code Ann. § 57-1 (2003). For earlier texts of Jefferson's bill, see *A Bill for Establishing Religious Freedom* (1779), in *The Papers of Thomas Jefferson* vol. 2, 305 (facing), 545 (Julian P. Boyd ed., Princeton U. Press 1950).

State constitutions adopted after 1776 also contained protections for religious belief and worship although protected rights were frequently limited where the peace and safety of the state were endangered. See e.g. Md. Const. of 1776 art. XXXIII (protecting religious belief and worship); Mass. Const. of 1780 pt. 1, art. II (same); N.H. Const. of 1784 art. V (same); N.J. Const. of 1776 arts. XVIII-XIX (same); N.Y. Const. of 1777 art. XXXVIII (same); N.C. Const. of 1776 art. XIX (protecting right to worship according to dictates of conscience); Pa. Const. of 1776 art. II (protecting religious belief and worship); Vt. Const. of 1777 art. III (same).

When Madison discussed his support of religious liberty in 1818, he spoke of protections for belief and worship: "[I] [h]av[e] ever regarded the freedom of religious opinions & worship as equally belonging to every sect." James Madison, *Letter from James Madison to Mordecai M. Noah* (May 15, 1818), in *The Writings of James Madison* vol. 8, 412, 412 (Gaillard Hunt ed., The Knickerbocker Press 1908). Similarly, the Baptist proponent of religious liberty, John Leland, called for the freedom to worship and believe as one pleased. See John Leland, *The Rights of Conscience Inalienable* (originally published 1791), in *The Writings of the Late Elder John Leland*, 177, 184 (L.F. Greene ed., G.W. Wood 1845) [hereinafter *Leland Writings*].

108. Thomas Jefferson, *Letter from Thomas Jefferson to Thomas Leiper* (Jan. 21, 1809), in *The Writings of Thomas Jefferson* vol. 12, 236, 236-37 (Andrew A. Lipscomb ed., Thomas Jefferson Meml. Assn. 1904); see also Thomas Jefferson, *Letter from Thomas Jefferson to Ezra Stiles* (June 25, 1819), in *The Writings of Thomas Jefferson*, *supra*, at vol. 15, 202, 203 (stating that "[i]n that branch of religion which regards the moralities of life, and the duties of a social being, which teaches us to love our neighbors as ourselves, and to do good to all men, I am sure that you and I do not differ . . . [though] [w]e probably differ on the dogmas of theology, the foundation of all sectarianism, and on which no two sects dream alike"); Thomas Jefferson, *Letter from Thomas Jefferson to Mordecai Noah* (May 28, 1818), in *The Jefferson Bible* 377, 377 (O.I.A. Roche ed., Clarkson N. Potter, Inc. 1964) (referring to "the moral basis on which all our religions rest as the rallying point which unites them in a common interest; while the peculiar dogmas branching from it are the exclusive concern of the respective sects embracing them"); Thomas Jefferson, *Letter from Thomas Jefferson to William Canby* (Sept. 18, 1813), in *The Writings of Thomas Jefferson*, *supra*, at vol. 13, 376, 377 (stating that "he who steadily observes those moral precepts in which all religions concur, will never be questioned at the gates of heaven, as to the dogmas in which they all differ"); Thomas Jefferson, *Letter from Thomas Jefferson to James Fishback* (Sept. 27, 1809), in *The Writings of Thomas Jefferson*, *supra*, at vol. 12, 314, 315 (stating that "the interests

John Leland agreed: "[s]o far as my acquaintance extends, all parties agree that the words of our Lord give the best description of morality that was ever given: 'Whatsoever ye would that men should do unto you, do ye the same to them.'"¹⁰⁹ Jefferson would have approved of Leland's description of our moral duties. Jesus was, according to Jefferson, the greatest moral teacher, and his principles were the most "pure, benevolent, and sublime which have ever been preached to man."¹¹⁰ In late eighteenth-century America, for deist, rational Christian, and evangelical alike, the commandment to love God and neighbor was the chief guide for human conduct and virtuous living.¹¹¹

Thus, proponents of religious liberty in the founding era were not familiar with the environment of moral pluralism that fuels debates today. Scholars in today's academy who advocate restraints on religion in political argument and decision-making do so because religiously based moral values do not command the assent of the entire population. In the founding era, by contrast, religiously based morality was viewed as a unifying force and as essential for good government. Most Americans believed that virtue was

of society require the observation of those moral precepts only in which all religions agree, (for all forbid us to murder, steal, plunder, or bear false witness), and . . . we should not intermeddle with the particular dogmas in which all religions differ, and which are totally unconnected with morality").

Jefferson believed that God has created all persons with a moral faculty or "moral sense" capable of discerning right from wrong. Thomas Jefferson, *Letter from Thomas Jefferson to Thomas Law* (June 13, 1814), in *The Writings of Thomas Jefferson*, *supra*, at vol. 14, 138, 141-42; Thomas Jefferson, *Letter from Thomas Jefferson to Peter Carr* (Aug. 10, 1787), in *The Writings of Thomas Jefferson*, *supra*, at vol. 6, 256, 257-58. This moral faculty has its foundation in sentiment or feeling, and expresses itself in a disposition of benevolence and concern for others. See Jefferson, *Letter from Thomas Jefferson to Thomas Law*, *supra*, at 141-42; Jefferson, *Letter from Thomas Jefferson to Peter Carr*, *supra*, at 257-58; Thomas Jefferson, *Letter from Thomas Jefferson to Mrs. Cosway* (Oct. 12, 1786), in *The Writings of Thomas Jefferson*, *supra*, at vol. 5, 430, 442-43; Thomas Jefferson, *Letter from Thomas Jefferson to Robert Skipwith* (Aug. 3, 1771), in *The Papers of Thomas Jefferson*, *supra* n. 107, at vol. 1, 76, 76-77. For this view, Jefferson was indebted to the leading figures of Scottish Common Sense realism. See Henry F. May, *The Enlightenment in America* 346, 293 (Oxford U. Press 1976). The Scottish philosophers also influenced others in the founding era, including John Witherspoon, Madison's teacher at Princeton. See Thomas Miller, *Introduction*, in *The Selected Writings of John Witherspoon* 1, 36 (Thomas Miller ed., S. Ill. U. Press 1990); John Witherspoon, *Lectures on Moral Philosophy*, in *The Selected Writings of John Witherspoon*, *supra*, at 152, 161 (affirming the existence of a moral sense but distinguishing his view from those who based this sense exclusively in feeling).

109. John Leland, *The Government of Christ a Christocracy*, in *Leland Writings*, *supra* n. 107, at 273, 280-81 (originally published 1804).

110. Thomas Jefferson, *Letter from Thomas Jefferson to the Reverend Jared Sparks* (Nov. 4, 1820), in *The Writings of Thomas Jefferson*, *supra* n. 108, at vol. 15, 287, 288.

111. See e.g. John Adams, *Diary* (Aug. 14, 1796), in *The Works of John Adams* vol. 3, 423 (Charles F. Adams ed., Charles C. Little & James Brown 1851); Isaac Backus, *An Appeal to the People* (1780), in *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-1789*, at 385, 391 (William G. McLoughlin ed., The Belknap Press of Harvard U. Press 1968) [hereinafter *Backus, Church, State, and Calvinism*]; Thomas Jefferson, *Letter from Thomas Jefferson to George Logan* (Nov. 12, 1816), in *The Papers of Thomas Jefferson, Second Series: Jefferson's Extracts from the Gospels* 381, 381 (Dickinson W. Adams ed., Princeton U. Press 1983); Leland, *supra* n. 107, at 187; Witherspoon, *supra* n. 108, at 177, 180.

necessary for the success of popular government and that religion was essential to support morality.¹¹² George Washington expressed this belief well in his Farewell Address in 1796: "Tis substantially true, that virtue or morality is a necessary spring of popular government" and "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle."¹¹³ In the words of James Madison, "the belief in a God All Powerful wise & good, is . . . essential to the moral order of the World & to the happiness of man."¹¹⁴ For some in the founding era, this link between religion and virtue, on the one hand, and virtue and good government, on the other, counseled in favor of government support for religion.¹¹⁵ Virginia's assessment bill for the support of Christian teachers, which prompted Madison's famous *Memorial and Remonstrance*,¹¹⁶ reflected this assumption: "the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers."¹¹⁷ When Madison remonstrated against the assessment, he did not dispute the necessity of religion to virtue or virtue to good government.¹¹⁸ Nor did he object on the

112. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Republic* 89 (Cornell U. Press 1995). For examples, see Isaac Backus, *Policy as Well as Honesty* (1779), in Backus, *Church, State, and Calvinism*, *supra* n. 111, at 367, 371; Isaac Backus, *Government and Liberty Described* (1778), in Backus, *Church, State, and Calvinism*, *supra* n. 111, at 345, 358; John Witherspoon, *The Dominion of Providence over the Passions of Men* (1776), in *The Selected Writings of John Witherspoon*, *supra* n. 108, at 126, 144; John Witherspoon, *Sermon Delivered at a Public Thanksgiving after Peace*, in *The Works of John Witherspoon* vol. 5, 237, 265-66 (Edinburgh 1815); see also James Madison, *Notes for Debates on the General Assessment Bill* (Dec. 1784), in *The Papers of James Madison*, *supra* n. 89, at vol. 8, 195, 199 (affirming the importance of religious associations for preserving public morals).

113. George Washington, *Farewell Address* (Sept. 19, 1796), in *The Writings of George Washington from the Original Manuscript Sources 1745-1799* vol. 35, 214, 229 (John C. Fitzpatrick ed., U.S. Gov. Printing Office 1940).

114. James Madison, *Letter from James Madison to Frederick Beasley* (Nov. 20, 1825), in *The Writings of James Madison*, *supra* n. 107, at vol. 9, 229, 230.

115. See e.g. Richard Henry Lee, *Letter from Richard Henry Lee to James Madison* (Nov. 26, 1784), in *The Letters of Richard Henry Lee* vol. 2, 304, 304 (James Curtis Ballagh ed., The Macmillan Co. 1914) ("Refiners may weave as fine a web of reason as they please, but the experience of all times shews Religion to be the guardian of morals—And he must be a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support."); Phillips Payson, *A Sermon Preached Before the Honorable Council, and the Honorable House of Representatives, of the State of Massachusetts-Bay, in New England, at Boston May 27, 1778*, in *The Pulpit of the American Revolution: Political Sermons of the Period of 1776*, at 323, 340 (John W. Thornton ed., Burt Franklin 1970) (originally published 1860) ("Let the restraints of religion once be broken down, as they infallibly would be by leaving the subject of public worship to the humors of the multitude, and we might well defy all human wisdom and power to support and preserve order and government in the state.").

116. Madison, *supra* n. 89.

117. *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784), quoted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 72 (1947).

118. Like others in the founding era, Madison believed that virtue was essential for the success of democratic government. According to Madison, "[t]o suppose that any form of govern-

ground that the various sects lacked a common morality.¹¹⁹ Rather, he merely argued that state support would harm rather than foster true religion.¹²⁰

Of course, those in the founding era could imagine moral standards different from their own. Many state constitutional protections for the rights of conscience contained exceptions for conduct that disturbed the public peace and safety of the state,¹²¹ and Madison himself appeared to support limitations where sects trespassed on the rights of others or threatened the public peace.¹²² The Baptist proponent of religious liberty, John Leland,

ment will secure liberty or happiness without any virtue in the people is a chimerical idea." *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* vol. 3, 537 (Jonathan Elliot ed., 2d ed., J.B. Lippincott Co. 1836); see also *The Federalist* No. 55, at 346 (James Madison) (Clinton Rossiter ed., NAL Penguin, Inc. 1961) (stating that virtue is essential for self-government and affirming the existence of sufficient virtue in American public).

119. In notes drafted for debate on the assessment bill, Madison catalogues disagreements among the sects on matters of doctrine and worship. He does not identify any disagreements over morals. See Madison, *supra* n. 112, at 197.

120. Madison, *supra* n. 89, at 299, 301-03. Proponents of religious liberty agreed that state support was not necessary for the support of religion. See Issac Backus, *Government and Liberty Described* (1778), in Backus, *Church, State, and Calvinism*, *supra* n. 111, at 345, 358-59; Thomas Jefferson, *Notes on the State of Virginia* 159-61 (William Peden ed., U.N.C. Press 1955) (originally published 1787); James Madison, *Letter from James Madison to Reverend Adams* (1832), in *The Writings of James Madison*, *supra* n. 107, at vol. 9, 484, 485-87; James Madison, *Letter from James Madison to Edward Everett* (Mar. 19, 1823), in *The Writings of James Madison*, *supra* n. 107, at vol. 9, 124, 126-27; James Madison, *Letter from James Madison to Edward Livingston* (July 10, 1822), in *The Writings of James Madison*, *supra* n. 107, at vol. 9, 98, 102-03; James Madison, *Letter from James Madison to Robert Walsh* (Mar. 2, 1819), in *The Writings of James Madison*, *supra* n. 107, at vol. 8, 425, 430-32.

121. See e.g. Ga. Const. of 1777 art. LVI (guaranteeing free exercise of religion "provided it be not repugnant to the peace and safety of the State"); Md. Const. of 1776 art. XXXIII (protecting religious belief and worship except where "under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights"); Mass. Const. of 1780 pt. 1, art. II (protecting religious belief and worship "provided [the subject] doth not disturb the public peace, or obstruct others in their religious worship"); N.H. Const. of 1784 art. V (protecting religious belief and worship "provided [the subject] doth not disturb the public peace, or disturb others, in their religious worship"); N.Y. Const. of 1777 art. XXXVIII (protecting "free exercise and enjoyment of religious profession and worship . . . Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State").

122. Madison, *Letter from James Madison to Reverend Adams*, *supra* n. 120, at 487 (advocating "an entire abstinence of the Govt. from interference [with religion] in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others"); Madison, *Letter from James Madison to Edward Livingston*, *supra* n. 120, at 100 ("I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace."). Madison's second draft for the Virginia Declaration of Rights guaranteed all men "the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, Unless the preservation of equal liberty and the existence of the State are manifestly endangered." James Madison, *Amendments to the Declaration of Rights* (1776), in *The Papers of James Madison* vol. 1, 174, 174-75 (William T. Hutchinson & William M.E. Rachal eds., U. Chi. Press 1962).

agreed with the necessity of such limitations¹²³ and gave some colorful examples from his experience. A Shaking-Quaker who threw his wife into a mill-pond was justly punished, as was a Virginia man who killed his wife and son in obedience to "a Shining One."¹²⁴ As Leland's examples suggest, however, such circumstances were not expected to occur often. John Locke had earlier referred to religious support for conduct that would endanger the foundation of civil society as "madness."¹²⁵ Leland spoke of "religious phrenzy."¹²⁶ Thomas Jefferson was no more sympathetic, though he may have been less concerned. When Jefferson reported in 1784 that states without establishments were flourishing with different religions but "all good enough; all sufficient to preserve peace and order," he observed that "if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the state to be troubled with it."¹²⁷ James Madison also expected that "rival sects, with equal rights, [would] exercise mutual censorships in favor of good morals."¹²⁸ Thus, while it was possible for those in the founding era to conceive of moral principles that diverged from settled opinion and undermined the stability of the state, such principles were viewed as the deranged imaginings of deviant individuals or groups. They were neither a serious threat nor a common occurrence. Moral difference was not yet viewed as genuine moral diversity or pluralism.

Judge Noonan is aware that Madison did not foresee the diversity of religious-moral doctrines that would soon characterize the American landscape. For Madison, the possibility that a believer's convictions would injure or scandalize others or threaten the foundation of civil society was seen as unlikely.¹²⁹ Madison was, according to Judge Noonan, "willing to run these risks without discussing them, confident . . . that the difficult cases would be rare and de minimus—confident . . . that the voice of God would not often be heard in distorted or eccentric ways."¹³⁰ Nor had Madison ever seen a crusade or anticipated one.¹³¹ The cost of free exercise has been high, but that cost was not envisioned in the founding era.¹³²

123. See John Leland, *The Yankee Spy*, in *Leland Writings*, *supra* n. 107, at 215, 228; Leland, *supra* n. 107, at 184.

124. Leland, *supra* n. 123, at 228.

125. John Locke, *A Letter Concerning Toleration* 50 (Patrick Romanell ed., 2d ed., Bobbs-Merrill 1955) (originally published in 1689).

126. According to Leland, "[t]he duty of magistrates is, not to judge of the divinity or tendency of doctrines; but when those principles break out into overt acts of violence, then to use the civil sword and punish the vagrant for what he has done, and not for the religious phrenzy that he acted from." Leland, *supra* n. 107, at 184.

127. Jefferson, *supra* n. 120, at 161.

128. Madison, *Letter from James Madison to Edward Everett*, in *supra* n. 120, at 127.

129. See Noonan, *supra* n. 9, at 89.

130. *Id.*

131. See *id.* at 258.

132. See *id.*

B. *Developing James Madison's Original Insight*

If Madison did not foresee today's diversity of religious values and moral principles, why should one assume that the idea he helped to formulate demands freedom to participate in the political sphere as well as freedom of profession and worship? If the believer can follow her conscience in matters of belief and worship, she arguably has all the protection she needs. Additional liberty to enter politics and enact her own views of religious truth threatens the liberty of other believers and nonbelievers who have different understandings of religion and morality. Unrestrained religious participation in politics also endangers public peace and stability.

For Judge Noonan, the answer to this question is that Madison's fundamental insight points in the direction of freedom in politics as well as in private life, even if Madison himself did not foresee all the implications of his principles. God and conscience are precedent to the demands of the state, and, thus, liberty, rather than restraint, in the political sphere is most consistent with the "force and power"¹³³ of the First Amendment. Judge Noonan has described the development of doctrine in legal and moral matters as a process "in which an idea or set of ideas have had their implications worked out, with the basic or dominant idea gradually driving out ideas incompatible with that dominant idea's mastery."¹³⁴ For Judge Noonan, the basic principle that undergirds free exercise is the "ultimate and absolute relation of each individual to God."¹³⁵

However, another question quickly follows. For the many participants in today's debate who do not share such a relation to God, why should Judge Noonan's theological conception of free exercise have any weight for them? Why should they seek to protect the freedom of conscience between individuals and a God who does not speak to them? For these scholars, the dominant idea in our tradition of religious freedom is not the primacy of humanity's relationship with God but, rather, values such as fairness, separation of church and state, respect, or political stability. Judge Noonan himself acknowledges that faith in a God who speaks to us is "stupendous in modern eyes."¹³⁶ How, then, can it ground a convincing case for religious involvement in political life? Judge Noonan's scholarship contains many replies to these questions, and it is in these responses that Judge Noonan makes his greatest contributions to the debate.

133. *Id.* at 3.

134. *Id.* at 5; see also John T. Noonan, Jr., *Development in Moral Doctrine*, 54 *Theological Stud.* 662, 672 (1993). Judge Noonan draws on the work of John Henry Cardinal Newman. For Newman's views on the development of doctrine, see John Henry Cardinal Newman, *An Essay on the Development of Christian Doctrine* (U. of Notre Dame Press 1989) (originally published 1845).

135. Noonan, *supra* n. 9, at 89.

136. *Id.*

For Judge Noonan, the relationship between God and human persons is not an idiosyncratic or narrowly sectarian experience in which only some people share and participate. Those who defend restraints on religious participation in politics frequently describe religious convictions as inaccessible to the broader population. Religious claims only make sense to those who take a similar leap of faith, and citizens in a liberal democracy should not be required to adopt a sectarian perspective in order to comprehend and converse meaningfully with their fellow citizens. For Judge Noonan, these scholars misunderstand the nature of religious belief. Religion does not begin with individuals or human communities, but with a transcendent Creator who chooses to communicate with the creatures he has made.¹³⁷ "Heart speaks to heart," and the human heart responds.¹³⁸ This communication is the root of belief, and it is "ineradicable."¹³⁹ It is part of human experience.¹⁴⁰ Thus, religious belief is neither idiosyncratic nor inherently sectarian. Its availability is not limited to a privileged few. Faith does involve a choice to respond to God and, thus, a type of leap, but the call is to all. God has created each human person with a heart that can experience and respond to God's heart.

Judge Noonan's critics will undoubtedly exclaim that they have never experienced any such communication. Judge Noonan's description of humanity's relationality with God is incorrect. Judge Noonan is not without responses. On the one hand, he identifies several aspects of human nature that manifest our creatureliness and point to an openness to the Creator. He observes that the human intellect has a "natural need . . . for truth."¹⁴¹ We also experience the "promptings of love" that move the rational will to seek the good.¹⁴² In both the need for truth and the desire for the good, human persons betray their connection to the transcendent. Indeed, both characteristics demonstrate an inextinguishable drive to know the source of human identity and values. The fact that "human beings have purposes that are not entirely malleable,"¹⁴³ that human nature is in many respects an unbudging reality that even the most clever philosophers cannot deconstruct or reconstruct, also places the relationship between the Creator and creature inescapably before us.¹⁴⁴

137. See *id.* at 1-2.

138. *Id.* The phrase "Heart speaks to heart" is from John Henry Cardinal Newman.

139. *Id.* at 2.

140. See *id.*

141. John T. Noonan, Jr., *To Be Better, Think Harder*, 139 N.Y. Times sec. 7, 28 (Feb. 25, 1990) (reviewing Stuart Hampshire, *Innocence and Experience* (Harvard U. Press 1989)).

142. John T. Noonan, Jr., *Posner's Problematics*, 111 Harv. L. Rev. 1768, 1775 (1998).

143. John T. Noonan, Jr., *The Metaphors of Morals*, in *Riding Time Like a River: The Catholic Moral Tradition Since Vatican II*, at 35, 44 (William J. O'Brien ed., Georgetown U. Press 1993).

144. See John T. Noonan, Jr., *The Natural Law Banner*, in *Natural Law and Contemporary Public Policy* 380, 381-83 (David F. Forte ed., Georgetown U. Press 1998); Noonan, *supra* n. 143, at 44.

For Judge Noonan, much can be known about the proper norms for human behavior and communal life by investigating and analyzing the requirements of human nature. Human nature itself is a light by which one can understand creation, and the field of natural law involves such exploration.¹⁴⁵ However, the Creator has provided further light in the person of Christ.¹⁴⁶ Judge Noonan continually invites and encourages his readers to look into this light. In Christ, one sees a model of love and mercy.¹⁴⁷ All can feel the attraction. The promptings of love within the human person recognize in Christ their guide.¹⁴⁸ If one follows Christ and looks not only at, but also with, the light of Christ, suddenly the world takes on a new aspect. For example, the slave becomes a brother, and the abolitionist is born.¹⁴⁹ The stranger becomes a neighbor, and the bonds of community are strengthened and the values of equity, justice, and charity are affirmed. The seemingly outrageous, stupendous claim in John's Gospel makes sense: Jesus is "the true light" which has come into the world.¹⁵⁰

Judge Noonan recognizes that our understanding of this light will never be complete.¹⁵¹ All persons exist in communities bounded by history and social context, and, thus, our insight into Christ is always limited.¹⁵² However, our knowledge can grow. The development of religious-moral doctrine involves a "complex constellation of elements."¹⁵³ Understanding grows as individuals and communities look more deeply into Christ.¹⁵⁴ Greater religious insight alone, however, is rarely sufficient.¹⁵⁵ Experience, shifting social structures, the exercise of human reason and analysis, the light displayed in human nature, and the leadership of farsighted individuals all play a role.¹⁵⁶ Thus, abolitionists were moved not only by a deeper knowledge of Christ but also by a deeper understanding of the demands of

145. See Noonan, *supra* n. 144, at 382-83; see also Noonan, *supra* n. 134, at 674 (referring to "the light of human nature" and its role in the development of religious-moral doctrines).

146. See Noonan, *supra* n. 134, at 671-73, 676-77; Noonan, *supra* n. 69, at 142, 144.

147. See Noonan, *supra* n. 69, at 142.

148. See Noonan, *supra* n. 142, at 1775.

149. See Noonan, *supra* n. 134, at 673 ("On the great question of human slavery, a better grasp of the fellowship effected by Christ has made the holding of any person in bondage intolerable."); Noonan, *supra* n. 142, at 1773 ("The abolitionists, dedicated Christians, declared slavery to be a national sin because slaves were our brothers and sisters.").

150. John 1:9. Judge Noonan has noted that Madison's references to the "light of Christianity" and the "light of revelation" in his *Memorial and Remonstrance* echo John 1:9. See Noonan, *supra* n. 9, at 87. Judge Noonan also speaks of God's light as the "light of the world." John T. Noonan, Jr., *Stars of the Order: Brilliance, Diversity, Reflecting and Reflected Light*, 42 *Spirituality Today* 101, 109 (1990).

151. See Noonan, *supra* n. 134, at 676; Noonan, *supra* n. 69, at 144.

152. See Noonan, *supra* n. 134, at 676-77.

153. *Id.* at 676.

154. See *id.* at 672-73, 677.

155. See *id.* at 673.

156. *Id.* at 672-76; see also John T. Noonan, Jr., *On the Development of Doctrine*, 180:11 *America* 6, 8 (Apr. 3, 1999); Noonan, *supra* n. 142, at 1775.

human nature.¹⁵⁷ Equity, respect, and reciprocity are principles of natural law as well as divine revelation.¹⁵⁸ Reason and revelation are not contradictory nor does the light of the Gospel extinguish the need for human reason. Both illumine one another and are connected in their source.

Thus, scholars who would exclude or restrict religion in politics make the terrible mistake of cutting off the political community from its divine origin and foundation. God has made the human person with eyes to see his light, a conscience to hear his voice, and a heart to respond to his heart. Through these channels, God wishes to communicate with individuals and, through them, to entire communities. God is not only Creator but also Governor and Lawgiver.¹⁵⁹ His two greatest commandments are the love of God and neighbor, and it is these that must undergird our human relationships and moral norms.¹⁶⁰ (On this, as on many matters, Judge Noonan and James Madison agree.) Scholars who are troubled by the role of religion in politics and favor restrictions envision a political community based upon values that all can agree upon or find accessible apart from religious faith. However, by doing so, they substitute human consensus for the order shaped by God. Much light would, thereby, be lost. The love that God has manifested in creation and redemption and that he calls us to imitate would be shut out where it does not garner the necessary human support. Whether the human mind can fully understand the demands of radical love and mercy without the guidance of revelation's light is unclear, but history shows that communities that have sought to cut ties with their Creator are unlikely to do so.¹⁶¹

Judge Noonan is careful not to join those who oppose restraints on the ground that we have no shared premises or common human reason that transcends our particular backgrounds, beliefs, and local communities.¹⁶² For Judge Noonan, religious convictions are not admissible because all beliefs are equally vulnerable to dispute and disagreement. For Judge Noonan, our knowledge is surely bounded by our historical context and experience, but it is not thoroughly perspectival. We can never completely escape the limitations of our particular perspectives, but there is, nevertheless, a common light that we can all draw upon and draw closer to. Human nature is a light, and the light of Christ brings even greater insight that draws us to itself. Our knowledge of both is always growing and never perfect, but there is firm ground on which we journey and towards which we strive. Our politics will, of course, always be the politics of "earthly cities," but where

157. See Noonan, *supra* n. 144, at 383 (emphasizing natural law foundations of abolitionism); Noonan, *supra* n. 9, at 250-52 (describing abolitionism as a religious crusade).

158. See Noonan, *supra* n. 144, at 381, 383.

159. See Noonan, *supra* n. 9, at 75; Noonan, *supra* n. 144, at 382.

160. See Noonan, *supra* n. 142, at 1775.

161. Cf. Noonan, *supra* n. 144, at 380 (pointing to the "fates of Germany and Russia, where the natural law was derided").

162. See *supra* text accompanying notes 64-68.

religious convictions can play a role in political argument and decision-making, political norms can reflect a "heavenly" light.

For Judge Noonan, experience provides additional support for his position. Just as experience plays an indispensable role in the development of moral and legal norms, so it is an appropriate standard by which to evaluate Judge Noonan's development of Madison's insight. The American experiment in religious freedom has, in fact, produced mixed results. On the one hand, religious involvement in politics has provided moral energy and direction to American society, and religion has functioned as "the foremost of our political institutions."¹⁶³ On the other hand, as a diversity of religious and secular views has replaced the moral homogeneity of the founding era, religious involvement in politics has been the source of division and conflict.¹⁶⁴ Indeed, in America's religious crusades, fervent and often strident campaigns to enact the will of God into American law has brought resentment, anger, alienation, and, in the case of abolitionism, even war.¹⁶⁵ Contemporary opponents accused religious crusaders of the same types of extremism and fanaticism that many scholars fear today.¹⁶⁶ However, while religious involvement in American political life has exacted a high price,¹⁶⁷ it has also been a vehicle of social and political progress.¹⁶⁸ Judge Noonan points to the "bitter passions" and "moral energy" that produced the Civil War but also "led to the liberation of the millions held in bondage."¹⁶⁹ The abolitionist crusade was at once "traumatic, paradigmatic, and triumphant."¹⁷⁰

Judge Noonan notes that the balance between progress and division is "precarious."¹⁷¹ Not all crusades have been for the good,¹⁷² and nothing guarantees that they will be.¹⁷³ Moreover, Judge Noonan expresses ambivalence about the methods of crusaders.¹⁷⁴ The harshness and intolerance of evil and evildoers is, perhaps, incompatible with Christ's commandment of love even though the ends are humane.¹⁷⁵ Judge Noonan withholds his

163. Noonan, *supra* n. 9, at 8, 114.

164. *See id.* at 114-15 (disagreement over the morality of slavery resulted in civil war).

165. *See id.* at 250-52, 257-60.

166. *See id.* at 119-27. According to Judge Noonan,

These outpourings of moral energy do not arise from the friendly and insipid tolerance of the genteel tradition. They horrify that tradition by their harshness, zeal, and intolerance of the evil to be crushed. Their objectives are humane; their methods and their spirit are religious in their rigor, their purity, their faith, and their fire.

Id. at 258.

167. *Id.* at 259, 260.

168. *See id.* at 8, 260, 357-58.

169. *Id.* at 357.

170. *Id.* at 4.

171. *Id.* at 358.

172. *See id.* at 8.

173. *See id.* at 250.

174. *See id.* at 259.

175. *See id.* at 258-59. At other times, Judge Noonan seems even more emphatic:

judgment as he notes that in the Gospel of Luke, Christ also declares that he has come to "send fire upon the earth."¹⁷⁶ However, despite these costs and his ambivalence about the methods of crusaders, Judge Noonan is confident that the price of excluding or restricting religion in political life would be even higher. Moral disagreement in politics is not always an evil that should be removed whenever it causes conflict or disharmony. Rather, it is often a sign and reminder that our understanding is always incomplete and that some laws are bad laws and need to be reformed. Reform, in turn, is often not possible without conflict. The fact that our values and legal norms have a "deeper and stronger foundation"¹⁷⁷ than human invention, and that a gap necessarily exists between what we can understand and what is in the divine mind, guarantees disagreement and even discord. Whether the changes that we press for at any point in time truly reflect progress is never entirely clear. We must act according to the light that we have,¹⁷⁸ and trust in God that he will bring human efforts to a successful end.¹⁷⁹ This ongoing struggle to discern what is right and to act upon our best judgment characterizes the human condition; if we remember that creation is an act of love,¹⁸⁰ we can be assured that our efforts will not be in vain.

Thus, Judge Noonan answers the familiar argument that religious participation in politics threatens political stability. He does not ignore the potential of religious involvement for divisiveness and conflict and even war. However, with division often comes progress, and the consequences of cutting the political community off from its transcendent foundation would be worse. Judge Noonan's defense of religious involvement in politics answers other familiar arguments as well. To those who complain that laws based upon religious convictions undermine human autonomy, he agrees that the free exercise of religion in politics will affect the liberty of citizens.¹⁸¹ Religious crusades, for instance, seek "to change the laws of the country and . . . the conduct of the people."¹⁸² Their goal is to impose religious-moral doctrines upon the country even in the face of significant opposi-

In the choice between strategies, there is only one Christian imperative—the imperative of charity. . . . It is the command of charity not to turn the campaign to eliminate abortion into a crusade against those who . . . practice abortion or promote its cause. . . . I do not believe myself that uncivil, uncharitable, violent ways are legitimate even for the protection of human life.

Noonan, *supra* n. 69, at 150-51. Judge Noonan seems less certain in *The Lustre of Our Country* that the methods of crusaders are impermissible.

176. See Noonan, *supra* n. 9, at 259 (quoting Luke 12:49).

177. John T. Noonan, Jr., *Hercules and the Snail Darter*, 135 N.Y. Times sec. 7, 12 (May 25, 1986) (reviewing Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard U. Press 1986)).

178. See Noonan, *supra* n. 134, at 676-77.

179. See Noonan, *supra* n. 9, at 210; cf. Noonan, *supra* n. 134, at 677 (Holy Spirit guides the development of Church doctrine).

180. See Noonan, *supra* n. 142, at 1775.

181. See Noonan, *supra* n. 9, at 115.

182. *Id.* at 250.

tion.¹⁸³ However, most political decisions involve the imposition of values, and, thus, full autonomy is not possible.¹⁸⁴ Nor is it desirable. As creatures, we can never be fully autonomous.¹⁸⁵ Our nature and purposes constrict us.¹⁸⁶ Freedom is essential in the relationship between the individual and God,¹⁸⁷ but God works through this relationship to shape society in some directions and not others.

Similarly, respect for others is not defined solely by whether one gives others reasons that they can share or find accessible. As discussed above, Judge Noonan does not believe that religious convictions are inaccessible. We are all made to know God. True respect requires more. It requires that we appreciate that "there are substantive goods to which every human being is entitled"¹⁸⁸ and that we seek to understand these goods and secure them for all. Thus, true respect for others requires that we acknowledge that we are shaped by God who "transcends humankind"¹⁸⁹ and that we endeavor to discover the divine will for human persons.

Some advocates of restraint have demanded a secular rationale for all coercive laws because they distrust revelation where it is not confirmed by reason.¹⁹⁰ These scholars are religious believers, but they are suspicious of religiously based moral claims that cannot be reached through a secular route.¹⁹¹ Judge Noonan offers a different perspective to his fellow believers. Reason is an important human faculty and, indeed, a gift from the Creator through which we can understand much of divine and human purposes. However, God has given us a greater gift. He has chosen to communicate to us in the revelation of Christ, and in Christ what he reveals is himself. In Christ we learn that God is love and that we are to imitate God's love.

183. See *id.* at 252.

184. See Noonan, *supra* n. 69, at 141.

185. See Noonan, *supra* n. 144, at 382.

186. See *id.*

187. See Noonan, *supra* n. 9, at 358. Judge Noonan writes: "[R]eligion itself requires religious freedom. Heart speaks to heart, spirit answers Spirit, freely." *Id.*

188. Noonan, *supra* n. 141.

189. Noonan, *supra* n. 144, at 382.

190. See Perry, *Religion in Politics*, *supra* n. 4, at 73-75; Audi, *supra* n. 1, at 124-25, 130, 141. In *Under God? Religious Faith and Liberal Democracy*, Perry substantially revises this view, and he now supports a less restrictive principle of self-restraint. Neither the establishment clause nor the morality of liberal democracy forbids citizens from making political decisions (including coercive ones) on the basis of religious convictions even if these convictions lack a plausible, independent secular rationale. Perry, *Under God*, *supra* n. 4, at 34-35. However, as a matter of self-restraint, Christians should be wary about making decisions based on biblically grounded moral beliefs about the requirements of human well-being where there is widespread, transdenominational disagreement about the belief, and no persuasive argument grounded on contemporary human experience supports it. *Id.* at 67-68. The absence of such support "warrants suspicion that the claim might be false." *Id.* at 68. In *Religion in Politics*, Perry had argued that the absence of a secular route to claims based on revelation "supports a *presumption* that the claim is *probably* false." Perry, *Religion in Politics*, *supra* n. 4, at 75 (emphasis added).

191. See Perry, *Religion in Politics*, *supra* n. 4, at 74-75; Audi, *supra* n. 1, at 130. For recent developments in Perry's thoughts, see discussion *supra* n. 190.

Reason is not contradicted and it is not abandoned, but it is enlightened by a greater Light.

In this essay, I have reflected on the light that Judge Noonan's writings sheds on the debate about religion in politics. Judge Noonan himself reflects upon the farsighted vision of James Madison and also on the light of God. Judge Noonan has described those who reflect upon, and reflect, God's light as "stars."¹⁹² Judge Noonan is certainly one of those stars. I have tried to capture some of his light. While Judge Noonan develops Madison's thought as he reflects upon it, my project has been much more limited. My purpose has been to better comprehend Judge Noonan's insights and to share the power that they have for me with others. I have not tried to improve upon Judge Noonan's contributions. However, if some of my discussion strays somewhat from what Judge Noonan has written, I hope he will not disagree with the direction.

192. Noonan, *supra* n. 150, at 101, 109.